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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

EDWARD MISHKIN, *Appellant*

v.

NEW YORK, *Appellee*

BRIEF OF

MARSHALL COHEN; JASON EPSTEIN (Random House); PAUL GOODMAN; WARREN HINCKLE (Ramparts); ERIC LARRABEE; WALTER MINTON (G. P. Putnam's Sons); NORMAN PODHORETZ (Commentary); RICHARD POIRIER (Partisan Review); BARNEY ROSSET (Grove Press); ROBERT SILVERS (The New York Review of Books); and WILLIAM STYRON,

AS AMICI CURIAE

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 49

EDWARD MISHKIN, *Appellant*

v.

NEW YORK, *Appellee*

BRIEF OF

MARSHALL COHEN; JASON EPSTEIN (Random House); PAUL GOODMAN; WARREN HINCKLE (Ramparts); ERIC LARRABEE; WALTER MINTON (G. P. Putnam's Sons); NORMAN PODHORETZ (Commentary); RICHARD POIRIER (Partisan Review); BARNEY ROSSET (Grove Press); ROBERT SILVERS (The New York Review of Books); and WILLIAM STYRON.

AS AMICI CURIAE

INTEREST OF AMICI CURIAE AND PRELIMINARY STATEMENT *

Amici are individuals personally and professionally concerned with the current conflict between those who seek greater freedom of expression, in printed and graphic forms, and those who seek to limit these forms

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* This brief is filed with the consent of both parties.

of expression to asserted norms of decency and morality. Our personal concern stems from our participation as individuals in the quality of American life and society. Our professional involvement derives from our day-by-day work in the creation, criticism and distribution of books, some of which from time to time breach putative norms of decency and morality.

At least since the days of Anthony Comstock, those in this country who would limit expression have been able to enlist on their side the police power of local, state and federal government agencies. Insofar as exercises of that power have been upheld by the state and federal courts of the nation, the judiciary too has been involved in the repression of images and ideas expressed in printed and graphic forms. We feel it is a Constitutional error of major proportions for this Court to continue to tolerate censorship activity—civil or criminal, federal, state or local. We believe the Court should once and for all outlaw all governmental policing of the images and ideas disseminated among adults in book and any other printed or graphic form.

Amici share the belief of those who say that the elimination of all censorship will have an effect upon the nation's attitudes and behavior, but we believe the net effect can work only to the good. Censorship breeds its own evil: by forbidding natural imaginative explorations in the world of sex, it foments an unnatural prurient interest in sex. So long as censorship exists, it is futile to imagine that commercial traders upon prurient interests can be made not to exist.

Prosecutions for obscenity have always been a major device for the censorship of literature and art in this country. Reputable as well as disreputable publishers,

booksellers, writers, and artists have been subjected to threats of arrest, arrest, prosecution, conviction, fine and imprisonment for their involvement in the production or dissemination of books and other printed material which violate putative norms. No one involved in the creation or distribution of American literature and art has been unaffected by censorship. So long as any censorship of books is permitted by *Roth,* no one can be sure that if today the police power gets invoked against the publisher of "The Dance With The Dominant Whip" it will not tomorrow be used against the paper-back distributor of "The American Dream". For the *Roth* doctrine, even as modified to this day, alleviates censorship only to a degree: persons working with material without importance get no license to publish and distribute freely, while those dealing with important literature can never be sure local law enforcement officials will entirely agree. The road from arrest and conviction to redress by this Court is arduous, expensive and long.

Moreover, freedom, in our democracy, should be uniform as well as full, and the administration of justice needs to be even-handed. Though *amici* may dislike, even despise, the content of some or many works which are being challenged as "obscene", those who produce them and those who read them were given as much Constitutional *right* to do so as those who produce and read works which are not challenged.

ARGUMENT

Amici have neither seen nor read the printed matter involved in this case, considering its actual content immaterial to a correct resolution of the larger issues posed by the case.* It is assumed, however, that the books involved are more-or-less as described by New York in its *Motion To Dismiss:* that "the covers of about nineteen of the books display women being whipped, beaten, tortured or abused"; that "practically all the book jackets depict symbols associated with fetishism"; that "one jacket depicts a lesbian seduction scene"; that "numerous exhibits display partially clothed or nude women whose breasts or buttocks are greatly exaggerated"; that in each case "the jackets relate to the subject matter of the book"; that the dominant theme of many of the books is "devoted to depicting pictorially and verbally innumerable scenes in which individuals are being tortured in varied and fantastic ways"; that many of the books "deal in great detail with whippings, beatings and spankings"; that "the victims, moreover, although portrayed in agony, experience pleasure"; that many of the books "present multiple and particularized incidents of sexual seduction (homosexual and heterosexual), sodomy, rape and masturbation".

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* *Amici* understand that the prosecution and conviction of Mishkin proceeded on the thoery that the "sadistic" and "masochistic" attributes of the material were "sub-categories or specialized types of obscenity," and that "intermixed in the statute as they are with such other terms as lewd, lascivious, filthy, indecent and disgusting, these terms only itemize or detail the characteristics of obscenity" which it is the purpose of the statute (Section 1141 of the New York Penal Code) to proscribe. See *Motion to Dismiss* herein at pages 10-11.

Amici may safely state their belief that the books thus described and suppressed, and for whose publication Appellant Mishkin was sentenced to jail, in all likelihood possess no recognizeable literary or artistic value. They are doubtless vulgar and in very bad taste, and deliberately designed to appeal to the "prurient interests" of some persons, perhaps even of average persons. It also seems likely that these works are offensive to putative community standards of decency, and that they convey ideas, if any, which are "without redeeming social importance". Nevertheless, *amici* submit these books cannot be suppressed, and Appellant Mishkin cannot be punished for preparing and publishing them, consistently with the Constitutional guarantees of freedom of expression.

A. Under the Developing Doctrine of This Court In Obscenity Cases, Suppressions and Convictions Should Be Declared Invalid Where There Is No Adversary Judicial Hearing Prior To Seizure of the Books and No Showing of the Elements Said To Constitute the Crime of Obscene Publication

(1) Even under New York's statement of the facts of the case, it appears that the books, upon which Appellant's conviction was based, were seized and suppressed without the type of prior, adversary hearing on the question of 'obscenity' which this Court has declared necessary to support a valid search or seizure. The State says: (at page 16 of its *Motion to Dismiss*) "The officers clearly had the right—possessed by the general public—to enter the shops and examine the books displayed for sale. Having observed that the books in question were pornographic, the officers then had the right to seize them." *Amici* submit that if New York is correct then no bookstore, no publisher's office, no public library is secure from having its shelves rifled by any policeman, any detective, perhaps

even any private citizen (schooled in "citizen arrest"), who enters the premises, opens a book, and merely "observes" what he takes to be obscene. From such a rule of Constitutional seizure not even acknowledged masterpieces of literature or art would be safe. But we believe New York cannot be correct and that, not being conditioned upon a prior judicial adversary hearing, the seizures of the books in question—whether obscene or not—were unconstitutional. *Mapp* v. *Ohio,* 367 US 643; *Marcus* v. *Search Warrants,* 367 US 717; *A Quantity of Books* v. *Kansas,* 378 US 205; *Freedman* v. *Maryland,* 380 US 51.

(2) Even were the books seized in this case properly before the court, no conviction for the possession or publication of allegedly "obscene" literature should be permitted to stand that rests upon the submission in evidence of the literature alone. Before a book may be banned, or its creator, publisher or distributor punished, the prosecuting authority should be obliged to prove not only the existence of *scienter,* as required by *Smith* v. *California,* 361 US 147, but also the other elements of the crime which this Court described in *Roth* v. *United States,* 354 US 476, and the cases which followed. As we understand the pertinent decisions, a book cannot be held obscene if it involves "material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any form of social importance." *Jacobellis* v. *Ohio,* 378 US 184; *Grove Press* v. *Gerstein,* 378 US 577; *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 US 684; *Roth* v. *United States, supra.* In addition, as the Court pointed out in *Manual Enterprises* v. *Day,* 370 US 478, a showing must also be made that the material has "patent offensiveness"—a quality which "no less than 'prurient interest' is essential to a valid determination

of obscenity . . ." In the case at hand, no proof appears to have been adduced by New York that the books in fact appealed to the "prurient" or other interest of anyone in the community, and no proof was adduced that the books went "beyond the pale of contemporary notions of rudimentary decency," local or national.

We do not believe that the *Roth* doctrine lays down any objective standard by which the average policeman, prosecutor, juror or judge can reliably distinguish "obscene" from constitutionally protected material. We do not believe *Roth* lays down any standard by which the average writer, critic, publisher or distributor can safely distinguish between material pointing to perdition and that having sanctity. But if the Court insists that *Roth* be applied as though it embodied an objective standard, which poets and policemen alike should be able to apply in their allotted tasks, then the elements involved should be capable of proof. If literature can, in fact, appeal to the prurient interest of persons, or if it can be patently offensive to some asserted local or national standard of decency, the allegations must be matters of proof just as are the elements that make up a case of criminal fraud or negligence. See: *United States* v. *Irving Klaw,* — F. 2d — (C.A. 2d, July 15, 1965.) Proof that the works are tasteless or disgusting or degrading or sickening, should, of course, be irrelevant. The trial judge below evidently was offered no proof of obscenity (nor of "sadism" or "masochism"); upon examining the books, he found them "sickening"; and on the basis of this response, he concluded that the books were legally obscene. Appellant Mishkin admits the "dominant theme" of his books was "erotic" but claims they are "at worst . . . trashy or vulgar . . . they probably are

a bore." We suspect he is correct. If so, they obviously cannot be obscene. Even if the books were proven to have been sickening, that is not enough to make them obscene. *United States* v. *Irving Klaw, supra.* As this Court has already once recognized with respect to magazines it found "dismally unpleasant, uncouth and tawdry . . ."—such qualities are "not enough to make them obscene." *Manual Enterprises* v. *Day, supra.*

If the Court determines to let *Roth* stand any longer, *amici* urge the Court to make clear to prosecuting and adjudicating authorities that no conviction for the crime of publishing obscenity will stand where the prosecutor rests his case upon the presentation to the Court of the "accused" literature alone. As though a state could validly convict a man of murder by having him sit in the dock. "Where the transcendent value of speech is involved, due process certainly requires . . . that the state bear the burden of persuasion to show that the appellants engaged in criminal speech." *Speiser* v. *Randall,* 357 US 513; *Freedman* v. *Maryland, supra.* The burden was not lifted, much less carried, by New York in this case. If it is in the nature of the *Roth* test that the burden of proof involved is incapable of being borne, then *Roth* should be abandoned, or all convictions under it forgone.

B. The Court Should Fashion a Bold Clear Rule To Govern Freedom of Expression In Printed and Graphic Forms Which Will Put An End To All Censorship of the Printed Word Or Image, Regardless of Sexual Connotation

The doctrine announced in *Roth,* even as amplified in *Manual Enterprises* and *Jacobellis,* has not eliminated literary censorship from the American scene. Yet as Justices Douglas and Black have so long in-

sisted, no less is asked by the First and Fourteenth Amendments. Although worthwhile books are being published today which could not have been published ten years ago without certain seizure, arrest, prosecution and conviction—what about the books of tomorrow? At least one high state court seeking conscientiously to apply the *Roth* doctrine, one day found that a book having obvious artistic importance was protected by the Constitution and not obscene, but on another, more recent day, found that a book of purportedly negligible literary and historic importance was unprotected by the Constitution, and was obscene* Exactly opposite conclusions, concerning each of the books involved, were reached by the highest court of another state, that in which the instant case arose.** Such decisions, even more than those of lower courts, expose the perhaps irreparable weakness of the *Roth* doctrine.

This Court has itself recognized that the experience since *Roth* has not entirely vindicated the approach to obscenity taken there, and that any different approach which did no more than substitute notions about "hardcore pornography" for notions about "obscenity" would likely enjoy no better fate. The Court has found itself obliged to exercise "its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case," without, however, assuming the function of Super-Censor. But

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* Consult: *Attorney General* v. *Book Named "Tropic of Cancer,"* 184 N.E. 2d. 328 and *Attorney General* v. *Book Named "Memoires of a Woman of Pleasure"*, — N.E. 2d — (April 22, 1965).

** Consult: *People* v. *Fritch*, 192 N.E. 2d 713; *Larkin* v. *G. P. Putnam's Sons*, 200 N.E. 2d 760.

amici fear that in the absence of a bold, clear rule, liberating all printed and graphic expression, the court will continue to be confronted by confused or recalcitrant prosecuting and judicial officials and, as the Chief Justice observed in *Jacobellis,* cases coming to it "in ever-increasing numbers."

We understand those who, like the Chief Justice, see in obscenity cases the need "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments." We recognize that "although the Federal Government and virtually every State has had laws proscribing obscenity since the Union was formed, and although this Court has recently decided that obscenity is not within the protection of the First Amendment, neither courts nor legislatures have been able to evolve a truly satisfactory definition of obscenity." We cannot, however, agree that these propositions warrant the Court to conclude that there must be at hand, or just out of hand, some such satisfactory definition—"a rule of reason in this as in other areas of the law." We cannot agree, that is, that all the *Roth* test needs is a little more gloss.

It cannot be often enough remembered that what is obscene to one person may be the laughter of genius to another; that there is, and can be, no community agreement on such things; that what is prurient to an Arkansas housewife may be only a bad joke to a New York executive; and that, depending upon a variety of psychological and cultural factors, persons might have their "prurient interest" aroused not only by "spike type heels, leather boots, tight clothing, gloves, whips,

ropes and belts. . . ." (*Motion To Dismiss* herein at page 9), but even by "the pronounced and regular rhythms of the Sousa march, 'The Stars and Stripes Forever', played by a Marine band. . . ." (La Barre, "Obscenity: An Anthropological Appraisal", in 20 Law & Contem. Prob. 536). Yet, free speech and free press must not, in this country, be geared to a mercurial standard.

In seeking to lend support to our states' and the nation's natural aspirations to compose a decent as well as a good and honorable society, the Court or some of its members have on occasion looked to the prerogative of the State or Nation to "maintain a decent society" or "its moral fiber," and to the "social interest in order and morality." *Amici* submit, however, that it is no proper role of the judicial branch to supervise, on a local or national basis, the maintenance of "decency" or "morality" in the communication of sexual ideas, just as it would be no proper role for the courts to insure that the people of New York or Texas or Hawaii or all America refrained from communicating patently offensive or sickening political ideas. It may be true, as a few of this Court's earlier cases and some noted legal commentators have suggested, that ours like most societies may enlist a police power to enforce, in certain situations, the most elemental forms of decency. Thus, blunt scenes of sexual love-making on the day-time television screen, graffiti on highway billboards, indecent public exhibitions of the person, and obscene utterances in public conveyances, might be outlawed without much danger to, or undue restraint upon, freedom of expression. These contain elements of coercion upon those who may object to obscenity and whose right to reject such material

should be protected. At the same time, persons having no objection to obscenity must retain a right to be protected from coercion of the other side. There is no coercion involved in the reading of a book, however vile, or the attending of a motion picture film, however prurient. Our government, in this area, stays within its Constitutional bounds when it protects persons from public nuisance and shocks from which they can have no immediate escape or recourse. It commits unconstitutional acts when it attempts more than this. There is a Censor's world of difference between the police power necessary to enforce rudimentary public decency and the network of municipal, state and federal, police, administrative, and judicial systems required to confine the sexual images and ideas presented in books and other forms to asserted norms of decency.

In our view, federal, state and local law enforcement agencies were given no more scope, under the Constitution, to regulate the sexual morality or decency of the images and ideas communicated among the citizens, than they were to regulate their political or religious morality or decency. Accordingly, this Court need no more pause to strike down statutes or applications of statutes which punish persons for publishing putatively "obscene" books, than it hesitated to strike down a statute forbidding the exhibition of allegedly "sacrilegious" films. *Joseph Burstyn, Inc.* v. *Wilson,* 343 US 495.

Amici are mindful that evidence was introduced to show that Appellant Mishkin hired "writers" and "artists" to produce the books in question in accordance with what might seem to be a perverse formula, that is, there was testimony that he instructed them "to deal with sex in an unusual manner," to create

scenes "in which women were making love with women" and "men making love to men, and there were spankings and scenes—sex in an abnormal and irregular fashion," and to emphasize "beating and fetishism." While *amici* have no wish to applaud such commercial exploitation of sexual interests as may have been involved here, they do not understand how the Constitution discriminates between commercial and non-commercial exploitations, nor even between entertaining exploitations and instructive explorations. Between Mishkin and Krafft-Ebing * there may exist a comfortable divide, but what about Faulkner? **

It is not, we hope, only self-interest which urges us to question a suggestion in *Jacobellis* that despite all the problems presented by the *Roth* doctrine, it should continue to be enforced in order that "those who profit from the commercial exploitation of obscenity" may not "continue to ply their trade unmolested." For we fear such suggestions may be interpreted not as an affirmation of the duty of law-enforcement officials to cleanly apply due criminal process against any and all persons believed to have committed validly-enacted, well-defined crimes, but as an invitation to such officials to harass, intimidate and persecute, through the ready devices of the criminal law, persons financially ill-equipped to defend the freedom of a literature itself

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* But see Krafft-Ebing's "Preface to the Twelfth Edition" of *Psychopathia Sexualis:* "Its commercial success is the best proof that large numbers of unfortunate people find in its pages instruction and relief in the frequently enigmatical manifestations of sexual life."

** See Faulkner's "Introduction" to *Sanctuary:* "This book was written three years ago. To me it is a cheap idea, because it was deliberately conceived to make money."

ill-designed to attract to its side persons who are appreciative of, and prepared to argue for, its importance. It is a dangerous idea that the molesting of disreputable publishers may be a proper activity of government. Such activity seems to us a grave breach of the constitutional guaranties both of freedom of the press and equal protection of the laws.

CONCLUSION

Wherefore, it is respectfully urged that the judgments of the Courts below in convicting and upholding the conviction of Appellant Mishkin, be set aside.

Respectfully submitted,

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